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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-350

ATLANTIC IMPROVEMENT CORPORATION

Petitioner,

vs.

THE CITY OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered on June 10, 1976.

Opinions Below

The opinions rendered in this action, in reverse chronological order, are:

Opinion of the Court of Appeals of the State of New York dated June 10, 1976 (Appendix, pp. 1a to 2a), which is reported at 40 N.Y.2d. 905 (1976);

Opinion on Remittitur of the Appellate Division of the Supreme Court of the State of New York dated June 23, 1975 (Appendix, pp. 3a to 4a),

which is reported at 48 App. Div.2d 895, 372 N.Y.S. 2d 986 (2d Dep't 1975);

Opinion of the Court of Appeals of the State of New York dated November 27, 1974 (Appendix, pp. 5a to 6a), which is reported at 35 N.Y.2d 845, 363 N.Y.S.2d 85, 321 N.E.2d 877 (1974);

Opinion of the Appellate Division of the Supreme Court of the State of New York (including dissenting opinion), dated April 15, 1974 (Appendix, pp. 7a to 18a), which is reported at 44 App.Div.2d 694 354 N.Y.S.2d 988 (2d Dep't 1974);

Opinions of the Supreme Court of the State of New York, Castaldi, J., dated June 19, 1973, June 13, 1973, June 5, 1973 and April 3, 1973 (Appendix, pp. 19a to 51a), which are unreported;

Opinion of the Court of Appeals of the State of New York dated June 9, 1971 (Appendix, pp. 52a to 58a), which is reported at 28 N.Y.2d 465, 322 N.Y.S. 2d 708, 271 N.E.2d 546 (1971);

Opinion of the Appellate Division of the Supreme Court of the State of New York dated June 22, 1970 (Appendix, pp. 59a to 60a), which is unreported;

Opinions of the Supreme Court of the State of New York, Groat, J., dated June 24, 1968 and June 13, 1968 (Appendix, pp. 61a to 65a), which are unreported.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was rendered and entered on June 10, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and here denial of rights secured by the Constitution of the United States.

Questions Presented

1. Does it meet the requirements of just compensation under the Fifth and Fourteenth Amendments to the Constitution of the United States to base a condemnation award on the condemnee's costs in acquiring and improving the condemned property rather than on market value?

2. Is it constitutionally permissible under the Fifth and Fourteenth Amendments to the Constitution of the United States for the court in a condemnation proceeding to rule out of consideration on the condemnee's case the standard methods of valuation by capitalization of estimated future income and comparable sales, including sales of properties that the condemnor has designated as comparable sales?

3. Is it constitutionally permissible under the Fifth and Fourteenth Amendments to the Constitution of the United States for the court in a condemnation proceeding to rule out of consideration all of the facts and factors that any buyer and seller of the property would have considered?

4. Is it constitutionally permissible under the Fifth and Fourteenth Amendments to the Constitution of the United States for the court in a condemnation proceeding to reach a valuation and award for the condemned property in an amount far below values established by sales of properties conclusively found to be inferior?

5. Is it constitutionally permissible under the Fifth and Fourteenth Amendments to the Constitution of the United States for the court in a condemnation proceeding to give no consideration to the best use of the property and disregard the conclusively determined best use?

Constitutional Provisions Involved

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

This case involves what is undoubtedly the largest property in one ownership which has ever been condemned within a major American city. The 529-acre property, which is now part of the United States National Park system,* is known as Breezy Point, and is situated on the Atlantic Ocean, at the end of the Rockaway Peninsula in Queens County, New York City.

The property was condemned by the City of New York in November 1963 and August 1964 for the purpose of turning it into a public park, because it was regarded as more important in the public interest to so employ the property than to have it developed, as it was being developed, as a private project for much needed private housing.

At the time of the decision to condemn the property, the Mayor of the City described the property as follows:

> "Breezy Point, commanding one of the most magnificent vistas available anywhere within the limits of New York City, and containing the only major undeveloped beach-front expanse within the limits of New York City, is a precious asset incapable of duplication."

Similarly, in determining to condemn the property, the City Planning Commission of the City of New York stated that "Breezy Point is the last remaining oceanfront in New York and one of the world's great beaches."

The property has a very extensive beach front on the ocean, where clean water makes for excellent bathing, a substantial frontage on Jamaica Bay, excellent for boating, and commands "magnificent vistas" both out to sea and to the New York skyline.

* Gateway National Recreation Area, 16 U.S.C.A. §§ 460cc to 460cc-4.

Because of its size, environmental protection of water on three sides and built-in recreational facilities, it was ideal for the development of a self-contained apartment house community, for which it was master-planned and under development by petitioner (hereafter "claimant") for a period of three and a half years prior to condemnation.

Needless to say, there was nothing like it in or about New York City—the trial court found that none of the sales properties offered by either side for comparative value "measure up in value to Breezy Point"—and the bitter irony is that all sales of properties capable of comparison as value indicators were eventually held not to be so usable as a matter of law because they did not possess Breezy Point's outstanding valuable qualities of size, location and amenities, with the end result that the condemnation award was only a fraction of market value established by the sales of vastly inferior properties.

The development of the property by claimant, long underway and far advanced at the time of condemnation, included (1) the master planning of an entire apartment house community on a section of 122 acres of upland and 56 acres of readily fillable underwater land, known as the Initial Project Area (with development of the remaining acreage to follow); (2) a detailed site plan approved by the City showing the location, height, and floor area of each building to be built and specifications approved by the City for each building type; (3) agreement with the City on a street system, drainage system, and school facilities for the community and installation by the City itself of the principal water mains to service the area; (4) agreement by the City to increase the zoning designation of the property and to sell to claimant additional underwater land for building; (5) advanced construction of five 7-story apartment build-

ings, two 15-story apartment buildings and one town house apartment building; (6) virtual completion of a shopping center with leases signed for a major supermarket and five other stores; (7) completion of a new beach club and reconstruction of an existing beach club, with both in successful operation. A piece of the property had been purchased for constructing a church. Arrangements had been made with a bus company to extend bus service to the property. A rental building had been completed, and rental of apartments was ready to start.

As rental was about to start, the City condemned almost all of the property, leaving claimant only a landlocked 20-acre portion on which most of the construction had taken place. This remainder, separated from the water and the community development of which it was an integral part—left to be surrounded instead by parking lots and other facilities for a public park and beach—was thus decimated in value for its purpose of a private development with a private beach. To save itself from consequential damages to the remainder by reason of the condemnation and because the whole property, except for the buildings, was desired for the condemnation use, the City later contracted with claimant to purchase the buildings at cost and take the remainder at a price to be fixed in accordance with the footage award in the condemnation proceedings.*

At the first trial, both sides valued the property by the standard method of using sales of other properties. The City, contending that the highest and best use of the property was for one and two family houses, rather than for the type of development that was in progress and for which the

* The reason that the remainder was not condemned became apparent at trial when the City presented its theory that the condemned property should be valued as wholly undeveloped and as if there had been no development at all. As will be seen, the Court of Appeals accepted this proposition as the basis for its determination.

property was zoned, used 19 sales, mostly of sites which had been subsequently developed with one and two family houses, but included four sales of properties subsequently used for apartment house building in Belle Harbor, an area on the Rockaway Peninsula adjacent to Breezy Point. Claimant, contending that the highest and best use of the property was for the type of apartment house development which was underway, used 51 sales, all of properties that were subsequently developed with apartment houses. Included in these sales were the four apartment house properties in Belle Harbor used by the City, which claimant's experts considered the most pertinent sales because of their proximity to Breezy Point.

Claimant also utilized the other standard method of valuation, capitalization of estimated future income, based on estimating the income that would have been received from the development and the expenses that would have been incurred. As the development had been so thoroughly planned and was so far advanced in building, the expenses were readily calculated and indeed largely stipulated by the parties. One City expert even said that operating expenses would be less than estimated. The only element in the calculations that was questioned was the rents that could be expected, an item well within the competence and experience of expert evaluation and judicial determination.

The trial court, after a six weeks' trial, found that the highest and best use of the property was for an apartment house development, and, on the basis of both sales and capitalization, made an award of $39,775,208, amounting to an average of about $2.65 per square foot for the approximately 15,000,000 square feet of upland, including in that award the value of approximately 8,000,000 square feet of foreshore and underwater land condemned, which were of special value because shallow and readily available for filling and building. The award was less than half of the sales prices of the properties in Belle Harbor which both sides had considered comparable.

The Appellate Division, a court empowered in New York to review the facts as well as the law, and whose affirmance of the factual findings of a trial court is conclusive on the facts, unanimously affirmed the award.

The Court of Appeals, the state's highest appellate court, with jurisdiction only over legal questions, reversed and remanded the case for a new trial. It held that capitalization evidence could not be considered in a case, as it described this one, of land "completely bare" with plans for projected development, but on which "no part of the work had been contracted for or started" and "on which no work had even been begun."

The only way to account for this premise of decision, ignoring the enormous amount of work done and the advanced state of the development, is that the court embraced the stratagem of the City in gerrymandering out of the formal condemnation the integral part of the property on which construction had commenced, but still taking it by purchase on the basis of the condemnation award.*

The Court of Appeals also held that the sales submitted—including those in the nearby area of Belle Harbor that had been submitted as comparables by both sides—should not have been considered, since they were "in long established, densely populated residential centers," while the subject property was in an undeveloped area, and was "vastly larger" than the comparables. A City expert had acknowledged that the larger size was an advantage both for community purposes and economy of operation.

The court concluded by saying that "It should not be a matter of insuperable difficulty for claimant to establish the fair market value of the land taken in its actual physical state without recourse either to capitalization of income on unstarted projects or to comparisons of other properties essentially dependent on the same future projects," and that "some consideration" should be given to two connected transactions, by which claimant contracted to purchase the whole of Breezy Point three and a half years before condemnation and thereafter assigned to a cooperative of bungalow owners at the property the right on closing to buy a section on which most of the bungalows were located.

* Even looking at the condemned acreage with blinders on as to adjacent integral development, the court's statement that no work had been done was incorrect. There was, in fact, substantial work completed in the condemned area, including most of the sewers and water mains, the sewage pumping station, the rental building, and both beach clubs.

The sellers were a family of elderly sisters and a brother who had no capacity or inclination to develop the property and were overwhelmed in attempting to deal with 3,000 owners of bungalows on leased land. The family wanted to be rid of the burden and get for the property immediate cash sufficient to support themselves in their last years. They insisted upon including in their contract of sale with claimant a specific recital of their refusal to make any representations as to the rights of the bungalow owners—who had "always caused trouble" and asserted contractual and statutory rights to the land on which they had built—or as to the right of the purchaser to remove them in order to be able to develop the property. Thus the contract of sale, and of course the price, were made in reference to the uncertainty of development because of the tenant situation.

Immediately upon execution of the contract, the tenants put up such effective opposition in all quarters to the planned development that it appeared unlikely that claimant could develop the property at all for apartment house use unless it made peace with the tenants. This it was forced to do by assigning to their cooperative the right to buy the section they wanted to preserve their bungalow use and loaning them the money to do so, although claimant desired and had intended to use the whole property in its development. The trial court described the conditions under which the sale to the tenants was made as "riotous",

coming after "a series of incidents that were almost as if a gun was held to [claimant's] head."

Claimant's contract price was about 55¢ per sq. ft. The price to the tenants for their own bungalow use—dictated by them and to be taken on an "or else" basis of resort to "weapons" which they were "sure you know we have available to us"—was about 68¢ per sq. ft. The prices were far lower than the minimal prices of apartment house land or even one or two-family house land in New York City. The trial court had said that they were less than Breezy Point would be worth for pitching tents.

Upon the retrial, capitalization was, of course, not employed, although both City appraisers acknowledged that any prospective purchaser of the property would have employed this method in making his evaluation of the property.

In similar deference to the Court of Appeals' mandate, neither party employed sales in developed areas.* Claimant submitted 17 sales of undeveloped land, nearly all in marginal areas of New York City, because only such areas existed that were not built up. None of the properties had the advantages of Breezy Point. The City submitted 37 sales, also in marginal, undeveloped areas, almost all of which were ultimately used for one or two-family houses, which the City experts still contended was the best use of the property, although not suggesting why the property was not equally attractive for apartment living. There was one property offered by both sides—a large undeveloped tract directly across Jamaica Bay from Breezy Point, which ultimately became the site of a large apartment house development.

The trial court (a different judge) again found that the highest and best use of the property was for an apartment house community, and made an award of $31,000,000

* One of the City experts admitted that he was thus prevented from using the sales he considered to be the most pertinent and had used on the first trial—the sales in the adjacent community of Belle Harbor.

(amounting to an average of about $2.00 per square foot for the upland, assuming that all value for the underwater land was attributed to the upland).*

The court, of course, recognized that there were no "comparables" in the sense of "similar" or with like attributes and value of the condemned land. The court also realized the "vexing circumstances" of not being able to consider the likely income from development of the property—a factor that the experts for both sides agreed would be considered by any prospective purchaser**— and being subject to such strict limitations as had been placed on the use of sales of other properties. On this account the court felt obliged to rule out of consideration all but two of claimant's proffered sales because they were not very large tracts.

To the urging of the City that the court was thus driven to adopting claimant's costs as the award, the court responded with the words of this Court, that "it is the property and not the cost of it that is safeguarded by state and

* The valuation consisted of $2.65 per square foot for the 5,330,000 square feet of upland in the Initial Project Area, $.90 for the 2,400,000 square feet of underwater land in that area, $1.35 for the 9,000,000 square feet of upland at the rest of the property (the "Tip"), and $.45 for the 5,500,000 square feet of underwater land in that area. The two sections were alike in all respects and were of like value. The lower value was assigned to the Tip primarily because under the development plan building there would be delayed pending completion of the Initial Project Area.

** One City appraiser said in his appraisal report that any prospective purchaser or investor would necessarily utilize the capitalization approach, and estimate the income that would be derived from the property and the expenses necessary to produce that income:

> "In connection therewith, the prudent investor and/or builder would examine sales to ascertain whether an asking price for land fell within the zone of reasonableness. Before he would invest however, he would determine the most profitable type of improvement to add to the land. The cost to erect such building, added to the cost of land, would amount to his total investment. He would then examine rent potential and operating expenses to arrive at a realistic forecast of net operating income."

federal constitutions'' (*Olson* v. *United States,* 292 U.S. 246, 255 (1934)) and that ''original cost'' or ''purchase price'' and ''value'' are not synonymous (*United States* v. *Toronto, Hamilton & Buffalo Navigation Co.,* 338 U.S. 396 (1949)).

While perplexed, the court did know at least that in two sales of the one large property offered by both parties, in one sale of another large property offered by claimant (Birchwood), and other sales of large properties offered by the City—all of which ''did not measure up in value to Breezy Point''—it had minimum values to go on. It also had the guidance of the Court of Appeals in a 1969 case approving the determination of a trial court based on its consideration of ''many sales with little comparability'' that gave ''at least a glimmering of the path to the market place.''* Similarly, the trial court in the present case was able to find in the City's sales ''at least a vestige of value as related to Breezy Point.''

The court gave full consideration to the transactions by which claimant and the bungalow owners' cooperative (the ''Cooperative'') acquired their tracts at Breezy Point, and found, as its stated factual conclusions, that claimant's original contract to purchase Breezy Point was ''something less than a normal market sale'' that ''doesn't reflect the true or actual value of the property,'' and that the

* In that case, *In re City of New York* (*Boston-Secor Houses-Rusciano*), N.Y.L.J., January 21, 1965, p. 16, col. 2 (Sup. Ct. Bronx County), *rev'd.* 23 App. Div. 2d 658 (1st Dep't 1967), *rev'd,* 25 N.Y.2d 430 (1969), the trial court found that "by reason of differences in size, location, zoning, neighborhood or time of sale," none of the sales submitted "could be deemed comparable to the subject property," but also found, in rejecting the claimant's costs as a basis of value, that these sales still could be utilized in determining value, stating, in a decision that was ultimately approved by the Court of Appeals:

> "Nevertheless the Court has taken into consideration all of the sales submitted by both sides with the view that although no one sale submitted is wholly comparable, many sales with little comparability can add up to giving the viewer at least a glimmering of the path to the market place."

assignment by claimant to the Cooperative of the right to purchase its portion of the property was ''indeed a forced sale,'' in which 'claimant was under compulsion to sell to the Cooperative on the Cooperative's own non-negotiable terms.'' The court, nevertheless, explicitly considered these transactions in making its award. The lowness of the award made can be explained only by the fact that the court gave very substantial weight to those transactions.

The Appellate Division affirmed the award, this time in a 3-2 decision, ''on the opinion of the trial court.'' The Appellate Division—which, as noted, is the only New York appellate court empowered to review the facts—thus conclusively affirmed the trial court's factual findings, including the findings with respect to best use and the two transactions involving the simultaneous acquisition by claimant and the Cooperative of the Breezy Point property from its original owner, and that the sales submitted by both sides ''did not measure up in value'' to Breezy Point.

The dissent in the Appellate Division accused the trial court of ignoring the guidelines laid down by the Court of Appeals, in that it had ''excluded from its consideration'' the sales to claimant and to the Cooperative (which the trial court explicitly stated it had considered)* and criticized the trial court for giving any consideration to *any* of the sales offered by either party in that they were not ''truly comparable.'' It differed with the trial court on the factual finding of best use, without reference to all the trial court said as to the bases for its finding and without intimating what the dissenters may have thought the best use to be. The dissent also said, ignoring the three and a half years of planning and building that had accomplished so much in development of the property, that the use was ''no more than a hypothetical hope in the mind of the claimant.'' The dissent concluded that, as in ''a somewhat

* The dissent did not treat at all the factual findings of the trial court with respect to those sales.

similar situation" (*Matter of City of New York (Chestnut Properties)*, 39 App. Div. 2d 573 (2d Dep't 1972), *aff'd*, 34 N.Y. 2d 800 (1974)), the "proper method of valuation" was to add to the "recent actual sales price" the "costs of developmental enhancement." It is not apparent, as will be further noted, just what "sales price" the opinion was referring to, but it was referring back to the time years before of the simultaneous acquisitions by claimant and the Cooperative of the whole of Breezy Point, and was referring to acquisition cost.*

The Court of Appeals again reversed, in a one-paragraph opinion, agreeing with the dissent that one sale the trial court placed emphasis on (Birchwood) should not have been considered, but saying nothing about other sales. The court added that "little, if any weight was given to the prior sales of this property," *i.e.*, the sales to claimant and the Cooperative, and concluded that "the proper test for vacant land, unexploited or only partially exploited is that found in *Matter of City of New York (Chestnut Props. Co.)* (39 A.D. 2d 573, *aff'd.* 34 N.Y. 2d 800)." The case was remitted to the Appellate Division for a reappraisal "within the legal framework set forth in the dissent."

On remand, the Appellate Division, obviously believing that the Court of Appeals had dictated the amount of the award, although it had no such power and had said "We cannot go so far as to dictate the amount of the award and thus express no view on the actual amounts arrived at in the dissent," simply stated in a brief memorandum opinion:

> "In accordance with the memorandum of the Court of Appeals, we have reappraised this case 'within the legal framework set forth in the dissent.'

* In the *Chestnut* case, unlike the present case, the acquisition was an ordinary market transaction with no unusual features or circumstances, both sides agreed that there were no comparable sales, and there was no question that the property when acquired was readily available for its highest and best use of apartment building, as the seller had warranted.

> In so doing, we have arrived at the same result, and for the same reasons, expressed in the dissent."

The result was the award suggested in the dissenting opinion of $15,000,000—$16,000,000 less than the award it had previously affirmed, and about $25,000,000 less than the award it had initially unanimously affirmed. The $15,000,000 award was affirmed in the Court of Appeals in a brief memorandum opinion. (Appendix, pp. 1a-2a).*

The award was far below the prices in sales of properties that were conclusively found by the finders of fact not to "measure up in value to Breezy Point," and to indicate only a "vestige of value as compared to Breezy Point." The award was far less, for example, than the sales prices of the one large property submitted for comparable valuation by both sides—a property that was palpably inferior to Breezy Point in every way.**

* The $15,000,000 figure is a mystery. The dissent uses a variety of figures to reach an amount "representing the costs of developmental enhancement" (the figuring is incomprehensible) which come to $4,300,000, the amount to be added to the "actual sales price," making a total of $15,000,000. Deducting $4,300,000 from $15,000,000 leaves $10,700,000 for the condemned land, or about $.70 per square foot for 15,000,000 feet of upland, with nothing for the 8,000,000 square feet of underwater land condemned. The $10,700,000 figure cannot be identified with any "sales price." Perhaps the City is correct, however, in what it has since suggested, that the figure was taken from the price paid by the Cooperative, which was about $.68 per square foot. But regardless of just how the figure was derived it represents acquisition cost, and a price related only to a bungalow use, and without adding anything for appreciation over the next three years, which the City appraisers said would be 15% for land without any development going on.

** The City submitted a sale at $1.37 per square foot of this property, which was in a marginal area which the City itself described as being marked by "air pollution . . . poor subsoil conditions (that would have made the site development costs six times those at Breezy Point), foul odors, underground fires, and rats," and which had no beach or bay frontage or any amenities. The sale was at a time when, because of its zoning, the land was not available, as was the subject property. for the building of high-rise apartments. Claimant submitted a subsequent sale of this property, after its zoning was changed to make it available, like the subject property, for high-rise apartments, at $2.10 per sq. ft.—three times the land award made in this case.

The award represents a destruction of the investment in claimant's securities. On the basis of the award, the holders of claimant's common stock, which was issued to the public at $13.50 per share in 1961, and was selling at $23.50 in April 1962, just prior to the first rumors of condemnation, will not receive a penny. Similarly, the holders of claimant's junior preferred stock, representing a cash investment of $5,000,000 (in 1961 money), with accrued and unpaid interest of over $5,000,000 over 15 years, will not receive a penny.

In sum, for the first time that we know of in a condemnation proceeding, all market data has been excluded from consideration, together with all proof and determinations of best use, all evidence of the income to be expected (on extensive proof) from a property advanced in development, and all evidence of sales that at least establish market values below which no one attempting to ascertain the fair market value of the condemned property could value it, with a resulting award based on the owner's costs rather than on market value.

How the Constitutional Questions Were Raised and Decided Below

The constitutional issues sought to be reviewed were first raised in a motion for reargument made to the Court of Appeals after the first of that court's three decisions, in which it held that capitalization of estimated future income could not be used, and that the sales of other properties submitted by the parties could not be used. Prior to that decision, it had not been suggested by any court or party that no market data and none of the standard methods of valuation could be utilized, and both parties had utilized a substantial number of sales, so there was no occasion to raise constitutional questions.

In the motion for reargument, it was submitted that the Court of Appeals' decision "is unjust and unconstitutional

in result in denying claimant all the usual processes of proof of value" and "forecloses the possibility of proof of fair value and deprives Claimant of its property without due process or just compensation." The Court of Appeals denied the motion for reargument without opinion.

The constitutional issues were raised again before the trial court at the second trial, particularly in answer to the court's inquiry as to how it could determine value in the face of the Court of Appeals' ruling barring capitalization and so substantially circumscribing the use of sales. The trial court found, however, that it was able to meet its constitutional obligation and make a valuation on the basis of sales of other properties although they "did not measure up in value to Breezy Point." The award was certainly minimal as it was less than the prices in those sales.

The constitutional issues were then presented to the Appellate Division and Court of Appeals, with claimant contending that the position then assumed by the City—that sales like capitalization should not be considered and that claimant should be relegated to its costs—was constitutionally intolerable.

The Appellate Division affirmed the trial court's award on the basis of the trial court's opinion, and thus saved the award from constitutional attack by a minimum comport with constitutionality. The Court of Appeals, however, in complete disregard of the affirmed and hence conclusive factual findings on best use and value and with respect to the transactions by which claimant and the Cooperative purchased Breezy Point, pronounced as its rule of law that sales, like capitalization, could not be considered and that valuation should be based on costs, and remitted the case to the Appellate Division to make an award accordingly.

On motion for reargument to the Court of Appeals, claimant reasserted its position that any award "based solely on Claimant's land and development costs" and rulings "prohibiting the use of the ordinary, recognized methods of valuation would be plainly violative of the constitu-

tion." The Court of Appeals denied the motion for reargument without opinion.

On the remand to the Appellate Division directed by the Court of Appeals, the constitutional issues were again raised in the briefing and argument, but that court, in a brief memorandum of obeisance to the Court of Appeals, merely adopted the prior dissenting opinion in the Appellate Division and the award there suggested.

A third and last possible appeal to the Court of Appeals, exhausting the pursuit of claimant's rights in the state court system, was based entirely, with one minor exception, on federal constitutional questions now presented to this Court.

Reasons For Granting Writ

The highest court of New York State has pronounced and applied a rule of law in this condemnation case that is contrary to principles and rules of constitutional law established and reiterated by this Court. Not only has a confiscation of at least $16,000,000 in value of claimant's property thus resulted, but if the decision were allowed to stand it would be seized upon by condemning authorities across the land as a license similarly to take exceptional private property for public use and avoid the payment of just compensation. The most valuable of condemned properties, because of their distinctive valuable attributes, would be removed from constitutional protections, and it would become the law in such cases that only a condemnee's costs need be reimbursed rather than compensation for the property paid. All consideration of market value indicators would be eliminated in a single regard for the condemnee's costs. This Court has repeatedly spoken to the constitutional impermissibility of such a mode of reaching a condemnation award. It is of first importance in the busy area of condemnation that constitutional standards be maintained and that, in accord with the vigilance this Court has exercised to that end, the Court set condemning authorities

and courts of the country straight on the basics involved in this case, so that the decision sought to be reviewed does not become a pattern for subverting constitutional guarantees.

The decision of the New York Court of Appeals violates the constitutional prohibition against the taking of property without just compensation in basing the award on the landowner's costs, rather than market value, and ruling out of consideration the best use of the property, all market data, the standard methods of valuation by capitalization of expected income and market sales of other properties, and all the factors that a prospective purchaser of the property would consider.

The Fifth Amendment to the Constitution of the United States provides,

> ". . . . nor shall private property be taken for public use, without just compensation."

Until the present case, "just compensation" has always been defined to require that a landowner be paid the fair market value of condemned property. Here this requirement has been dispensed with, and it has been held sufficient to award reimbursement of his costs, without regard to market data or market value or the processes by which market value can and must be determined.

At the outset, we note that this Court has emphasized the importance of its function of reviewing the determinations of state courts in condemnation proceedings when those courts have adopted rules of law that operate to deny the landowner's right to obtain just compensation. As the Court said in *McCoy* v. *Union Elevated R.R. Co.*, 247 U.S. 354, 363 (1918):

> "We may examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right

> to just compensation. If the necessary result was to deprive him of property without such compensation then due process of law was denied him, contrary to Fourteenth Amendment."

The Court went on to state:

> "The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation." 247 U.S. at 365.

This is precisely what has happened in the present case. The New York court has formulated an arbitrary rule—that a condemnation award may be based entirely on a landowner's acquisition and development costs, without consideration of sales of other properties or any other market factors or indices of value—which has literally made it "impossible for [claimant] to obtain just compensation."

This Court has long made it completely clear that a condemnation award cannot constitutionally be premised on costs alone, or on the basis of any formula or arbitrary rule. Rather, the Court has continually held that, in order to meet the constitutional requirement of just compensation, a court must consider all pertinent market data, and all factors that would be considered by any prospective purchaser of the property.

Over 80 years ago, in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), this Court emphasized the critical importance of assuring that just compensation be paid for condemned property and that compensation may not be predicated on cost factors.

The Court there also noted that questions as to the proper methods of valuing condemned property were of the utmost importance for consideration by the Court, since "in any society the fulness and sufficiency of the securities which surround the individual in the use and

enjoyment of his property constitute one of the most certain tests of the character and value of the government." 148 U.S. at 324.

The Court has repeatedly held in following cases that a condemnee's costs could not be regarded or adopted as the measure of value in condemnation.

In *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 122, 123 (1924), concerned with the valuation of a ship, the Court said in apt analysis that the Court of Claims had erroneously based its award "upon the assumption that the money paid by claimant in furtherance of planning and building the ship was expropriated," but that "there was no requisition of money," rather of an interest in property, and that this interest must necessarily "be distinguished from [claimant's] expenditures for the production of the ship." Thus the Court explicitly rejected the condemnor's argument that the claimant "should have judgment only for an amount sufficient with what already has been paid to it to make up 'the amount actually invested in the ship taken,' " and stated governing truth:

> "The value of property may be greater or less than its cost; . . . It is the property and not the cost of it that is protected by the Fifth Amendment." 265 U.S. at 123.

In *Olson* v. *United States*, 292 U.S. 246 (1934), the Court again made it clear that an owner's costs could not, consistent with the constitution, be adopted as the basis for a condemnation award, since it was the owner's *property* that had been condemned, not his costs in acquiring or developing it. An award based on costs would be improper, as the condemnor could not "by any means confiscate the benefits . . . of the owner's bargain" in acquiring the property. The owner must receive, the court said:

> ". . . the market value of the property at the time of the taking contemporaneously paid in money. It may be more or less than the owner's investment.

> He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him . . . the public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. . . . it is the property and not the cost of it that is safeguarded by state and federal constitutions." 292 U.S. at 255.

The Court similarly held in *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949), that costs could not be the basis of valuation even when unique property was involved, and spoke of original cost as "the false standard of the past." Likewise in *United States* v. *Commodities Corp.*, 339 U.S. 121, 130 (1950), the Court ruled that costs were not relevant in determining just compensation, saying that the dispute about how to determine costs was beside the point, since "[t]he general rule has been that the Government pays current market value for property taken, the price which could be obtained in a negotiated sale, whether the property had cost the owner more or less than that price."*

The Court has made equally clear the *standard* that is to obtain in determining market value—the price that would be paid in a normal negotiation between a willing buyer and seller on the vesting date, meaning that all the facts and factors that would enter into consideration between such parties must be considered and enter into the determination of the condemnation court.

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* The legal principle that value cannot be based on costs is solidly premised on sound appraisal practice and on the wisdom and experience of the market place. As a leading real estate appraisal treatise puts it:

> "However, it should be re-emphasized that land value has little to do with the historic cost of the land or with the original price plus the expense of making it usable, putting in underground and other improvements."

American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* (4th ed. 1964), p. 228.

As stated in *Mississippi & Rum River Boom Co.* v. *Patterson*, 98 U.S. 206, 208 (1879):

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties."

In *New York* v. *Sage*, 239 U.S. 57, 61 (1915), the same market test was enunciated:

> ". . . what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact. . . ."

In *Brooks-Scanlon Corp.* v. *United States, supra*, the holding was that the award must be "the sum which, considering all the circumstances . . . would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." 265 U.S. at 123-24. The opinion listed a host of illustrative factors that a purchaser and seller of the property there involved would consider, and that were thus required to be considered by a condemnation court so as to arrive at "the sum which will put [claimant] in as good a position pecuniarily as it would have been if its property had not been taken." 265 U.S. at 126.

In *Olson* v. *United States, supra*, the Court addressed the problem of valuing "unique" property that is not ordinarily bought and sold. It said that in this situation "market value" remained the test, and that "all the circumstances" must then be considered, so as to reach "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser willing to buy." 292 U.S. at 257. The Court emphasized that in the absence of a readily ascertainable market value the inquiry into value is *not* to be *restricted*, but must necessarily be far-ranging:

> "In making that estimate there should be taken into account all considerations that fairly might be

brought forward and reasonably be given substantial weight in such bargaining." 295 U.S. at 257.

In *United States* v. *Toronto, Hamilton & Buffalo Navigation Co., supra,* the Court again dealt with "unique" property and reiterated the rule that all factors "bearing on what a prospective purchaser would have paid" must be considered and expressly ruled that "scattered" sales of other properties must be considered for their "bearing" on what a purchaser would pay for claimant's property. 338 U.S. at 402. As a leading valuation treatise put it, in discussing sales as a measure of value, "one of the reasons why the courts have declined to announce rigid rules is their recognition that the law, like the appraiser, must get along with the best evidence available . . ." 1 Bonbright, *Valuation of Property,* p. 137 (1965 ed.).

As recently as 1973, the Court reversed an award because the lower court had failed to consider the factors that a purchaser and seller in the market would have taken into account. *Almota Farmers Elevator & Whse. Co.* v. *United States,* 409 U.S. 470, 478 (1973). As the Court said, "That is not how the market would have valued such improvements; it is not what a private buyer would have paid Almota."

Because a condemnation court must consider all facts and factors that a buyer in the market would consider and thus reach a valuation that would correspond with the price such a buyer would pay upon those considerations, the Court has said that the determination of just compensation cannot be reduced to a "formula", *United States* v. *Cors,* 337 U.S. 325, 332 (1949). As Justice Frankfurter said in his concurring opinion in *Toronto,* when valuing "property rarely bought and sold" it is important that the trier of the facts not be "cramped by rules that are too rigid and too artificial"—he must be given "considerable freedom from hard and fast rules in determining what data are

relevant and what significance may be drawn from them." 338 U.S. at 407, 408.

In the present case the New York court has turned its back on all the teachings of this Court on condemnation valuation and governing constitutional principles. It has resorted to a "formula"—"rigid" and "artificial"—and one that this Court has most emphatically held cannot be the basis of a condemnation award. It has paid no heed to the standard of judgment mandated by this Court and has rejected all considerations that would enter into that judgment.

There can be no doubt as to the things a prospective purchaser would look to and consider in contemplating the purchase of real estate for investment purposes. He would consider first the uses to which the property could be put, and particularly what would be its most profitable use. If he was considering the property for residential building and renting he would get the demographic facts on the needs and demands for housing, the trends of population movement in respect to areas and kinds of housing sought, and consider the appeal and amenities of the particular property as compared with other areas and available properties.*

The second thing the prospective purchaser would consider is the profit potential in the property, the costs of

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* What the prospective purchaser would have found in this case was a critical shortage of housing in the New York metropolitan area, a strong movement of people out of the City center to outlying areas of the City and suburbs in search of recreational facilities and amenities, a strong trend to apartment house living, and a preference for the outskirts of Queens County where there was a growing demand and less than a 1% vacancy rate. He would have found in Breezy Point, within an hour's commute by car or public conveyance to the City center, spaciousness, a climate warmer in winter and cooler in summer than the City generally, matchless recreational facilities at hand, and a unique opportunity to build a whole self-contained community with all the environmental protection that could be wished. Undeniably, people in vast numbers would seek living accommodations there. The City appraisers conceded as much, but without reason contended that they would want to build their own homes rather than live in apartments—a premise contrary to the established and growing trend.

construction, the operating expenses, and rents that could be obtained.

The third thing he would consider would be competing land investment opportunities and market prices shown by sales of other properties that would give some indication of the market value of the property in contemplation, considering its pluses and minuses. Such process of comparative valuation that is employed in the market place every day is the basis of the uniform condemnation law and practice throughout the country of making "adjustments" for differences in properties.

And, of course, the prospective purchaser would consider the state of exploitation of the property, the extent and detail of the planning, the agreements with the City on zoning and municipal services, the construction under way and any leases that might have been made. He would be particularly aided by learning the costs of completing the project—so definite here that the parties were in agreement about them. Even if he were not interested in acquiring the portion of the property on which construction had principally taken place, he would regard as very important all that had been done adjacent to the property he was interested in.

For a court in a condemnation case to strike from consideration all of these things—disregard best use, shut its eyes to developmental accomplishments, rule out of consideration the vital matter of the income that might be expected from development, and pretend that no sales of other properties could be any indicator of the value of the property under consideration unless so like it that there are no differences to evaluate—is a flight from all realism.

To then hold, as the Court of Appeals did in its second decision, remanding the case to the Appellate Division to do its bidding, that the "proper" award for the taking of land "unexploited or only partially exploited" is the amount the owner has expended on the property is to deny all the teachings of valuation, condemnation and constitutional law. It means that unless exploitation has been

completed, no valuation or consideration of valuation essentials need be undertaken—just add up expenditures, ignoring the time, talent and effort devoted to the enterprise and the achievements thereof and all market data, and saving the bother of condemnation trials one has instantly a ready made award.

The Court of Appeals was correct in saying in its final words on the third appeal to that court that appellant asked it to "reverse our prior determinations." Beginning with a motion to reargue that Court's first decision and extending to its last word, claimant vigorously contended that the Court's whole course of excluding from consideration everything but costs—capitalization of expected income included—was a denial of constitutional rights.

As far as we can determine, while this Court has expressly held that even "scattered sales" of other properties must be considered, it has not *specifically* spoken to the use in condemnation of the capitalization of estimated future income as a valuation tool. It has, however, said time and again, as has been noted, that the constitutional mandate of just compensation requires a court to consider all factors that would be considered by a prospective purchaser of the property, and it is beyond question, as was agreed by the real estate experts for both sides, that any prospective purchaser of the property would employ the capitalization process in determining how much to pay for the property. The clear import of this Court's rulings, therefore, is that a condemnation court, which must apply the same criteria as a prospective purchaser of the property would, should take and consider capitalization evidence, certainly when a development is underway.

There are well-considered decisions of other eminent courts that have concluded that capitalization should be utilized in such a case as the present one, even where development had not extended nearly so far, precisely because any purchaser would employ the capitalization process in valuation.

Particularly significant is the decision of the Court of Appeals for the Fourth Circuit in *United States* v. *25.406 Acres of Land*, 172 F.2d 990 (4th Cir.), *cert. denied*, 337 U.S. 931 (1949). That case involved a proposed high-rise apartment house project which was to consist of an apartment hotel and several apartment buildings. At the time of the taking, no construction whatever had been commenced, and no leases had been obtained, although development had been planned, and financing and construction arrangements had been made. Thus, the project there was far less advanced than that in the present case, where construction had been substantially completed on eight of the apartment buildings and the shopping center, leases for all but one of the stores in the shopping center had been obtained, and two beach clubs were in full operation, and there was agreement between the parties with respect to construction costs and operating expenses.

The Court (per Parker, C.J.), held that it was proper and appropriate to use the capitalization of estimated future income in valuing the property, since the capitalization testimony ". . . related not to the nebulous cost of constructing a vague hypothetical project and the estimated income to be derived therefrom, but to the cost and expected income of a project which, according to the evidence, was definitely in the process of achievement." 172 F.2d at 992.*

* Not only did the Court of Appeals in the present case rule out of consideration the state of development and achievement at the time of condemnation that clearly was a most important fact for required consideration in any undertaking to value the property at the time of taking, but the pretense for ignoring it as non-existent, and hence justifying the exclusion from consideration of capitalization and sales of properties in developed areas, was itself unconscionable and unconstitutional. Accepting the City's gerrymandering out of the condemnation the acreage on which most of the development had taken place as excluding all that development from consideration was not only wholly unrealistic and unfair (as the trial court said, claimant could not be penalized by selective condemnation) but flew directly in the face of the ruling by this Court in *United States* v. *Miller*, 317 U.S. 369, 376 (1943), that "a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of all or part of it."

The court emphasized that a prospective purchaser of the property necessarily would consider the estimated income expected to be received from the project, so a court determining value should hardly "close its eyes" to this factor. The court said:

> "It seems equally clear that in estimating the value of the property for this use, i.e., what a willing buyer would have to pay a willing seller to purchase it, the witness should be allowed to take into consideration what it would cost to develop the property in this way and what income could be expected from it when developed. Certainly such matters would be considered by any business man in selling, buying or valuing the property; and when the court adopts the standards of the market place in making valuations there is no reason why it should close its eyes to how the market place arrives at and applies the standards. As was well said by the late Judge Henry G. Conner, one of the great judges of this Circuit, 'It is difficult to perceive why testimony, which experience has taught is generally found to be safely relied upon by men in their important business affairs outside, should be rejected inside the courthouse.'" 172 F.2d at 993.

See also, United States v. *Waterhouse*, 132 F.2d 699, 703 (9th Cir. 1943), *aff'd mem.*, 321 U.S. 743 (1944), where the Court of Appeals for the Ninth Circuit, in a ruling that was affirmed without opinion by an equally divided Court, held that capitalization evidence could be utilized "if there is any substantial evidence to show that the adaptability of the lands in question for the uses testified to was 'reasonably probable,'" since:

> ". . . in determining what a willing buyer would pay for the land, such buyer would estimate the net income from the land when used as he would use it,

and arrive at a value by capitalizing such income from which he would deduct his required profit, and thus arriving at an amount which he, as a willing buyer, would be willing to pay for the land." 132 F.2d at 702.

The holding in that case, that capitalization evidence is admissible whenever the use to which it is addressed is reasonably probable, leads to the final point to be made in this petition—that the decision of the New York Court of Appeals is a violation of the first essentials in a valuation that can qualify as just compensation, namely, that it be based on the highest and best use of the property and its value at the time of taking.

It has long been a basic and unquestioned postulate of the law of just compensation that property must be valued at its worth for the highest and best use to which it could be put *at the time of condemnation*, and that prior use is no determinant of best use. This postulate has been stated and consistently followed by courts throughout the land and declared by this Court as a primary guide to just compensation. *Mississippi & Rum River Boom Co.* v. *Patterson*, 98 U.S. 206 (1879); *Olson* v. *United States*, 292 U.S. 246 (1934).

The New York Court of Appeals, which has likewise declared the principle, did not say anything different in this case; it simply ignored the principle and acted contrary to it. The adoption of an owner's costs as an award is in itself a disregard of best use, certainly so unless there was a consideration and determination of best use and that the acquisition price represented best use value. The New York court made no such determination and made no mention of best use in any of its opinions, when it was a primary consideration pressed upon the court by claimant. And in this case there had been an explicit and conclusive finding of best use—that it was for an apartment house community, the use for which it was zoned and under development with

enthusiastic City cooperation—and it was the obvious fact (conceded as to the purchase by the Cooperative) that acquisition costs did not represent any best use valuation on either the acquisition by claimant or the Cooperative. Indeed, it was conclusively found by the triers of fact that the prices in these transactions did not represent the fair market value of the property for any use, and the assignment to the Cooperative was held to be a "forced sale," the type of transaction which may not even be considered in determining value. See 1 Orgel, *Valuation Under Eminent Domain*, § 22, at 99-102 (2d ed. 1953).

Not only was it acknowledged by the City appraisers that a bungalow use—which was the only use of the property at the time of claimant's purchase and the use for which the Cooperative bought—was not the best use, not even according to the City appraisers' claimed best use for one and two family houses (which they acknowledged was a far less valuable use than an apartment house use), but at the time of claimant's acquisition it was highly doubtful, because of the tenants' strong position and opposition, that the property would ever be usable for anything other than a bungalow use. Clearly, the prices paid by both claimant and the Cooperative were at most a measure of value only for a bungalow use.

At the time of condemnation, however, there was a complete change—a "transformation" as the second trial judge said—peace had been made with the tenants at the price of yielding to them the land they wanted to continue their bungalow colony, and claimant's property was advanced in development for an apartment house community.

Plainly, the Court of Appeals' laying down a rule of law that valuation was to be made on the basis of claimant's costs—without a mention of best use in any of its three opinions and with disregard of the entire development over three and a half years being the premise of its decision—was not only a violation of the basic requirement that valuation be based on best use, but was a violation of the

basic requirement that valuation be made as of the time of condemnation. In short, the court's decision was the antithesis of the law of constitutional valuation and compensation.

CONCLUSION

A writ should issue to permit the Court to review the decision of the New York Court of Appeals that has denied the constitutional rights of petitioner, and to assure not only that an award will be made that respects those rights, but also assure that the decision of the New York court does not become a blueprint for denying just compensation whenever an exceptional property is condemned.

Respectfully submitted,

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